IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Criminal Appellate Side

(1) Criminal Writ Petition No. 1893 of 2006

Shri Abdul Jilani Gafoor Shaikh ..Petitioner

vs.

1. Mr.Shivaji Bodkhe & Ors. ...Respondents

Shri B.A.Patil for petitioner.
Shri K.V.Saste for respondents.

(2) Criminal Writ Petition No. 2038 of 2006

Shri Irshad Abdul Jilani Shaikh ..Petitioner

Vs.

1. Mr.Shivaji Bodkhe and ors. ..Respondents

Shri B.A.Patil for petitioner
Shri K.V.Saste for respondents.

CORAM: S.C.DHARMADHIKARI J.
20th April, 2007

P.C.

1. These are two more matters in the series of several petitions challenging Externment proceedings in this Court. This Court's constitutional jurisdiction is invoked to challenge the externment proceedings and infirmities and lacunas, which are serious in nature, having been pointed out, repeatedly the authorities pass orders which contain same infirmities and lacuna. It appears that such orders are passed as a matter of course with a view to ensure that the persons who are facing

criminal cases and enlarged on bail by the criminal courts do not remain within the area of their residence or business. This might be a precautionary measure according to the police authorities but far from assisting them it is likely to highlight their inability to control the situation. It would demonstrate their failure to handle the situation at the ground level and tackle law and order problems. Externment proceedings are not a substitute for punishing people who are accused in criminal cases. Directing them to remove themselves out of a particular area is hardly a solution. More so, when it is otherwise permissible in law to ensure that they remain out of the concerned areas.

2. I hope that the above would suffice for the authorities.

3. The petitioner in writ petition no.1893 of 2006 is father and the petitioner in writ petition no.2038 of 2006 is son.

4. As far as the father is concerned a show cause notice dated 13th January, 2006 was served on him for having allegedly committed the acts enlisted in the instances which are to be found at internal page 2 of the show cause notice. In the show cause notice itself it is alleged

that there are 3 cases which have been registered against the father at Dindoshi Police Station alleging offences punishable under the Indian Penal Code and the cases are sub judice. The instances are thereafter elaborated at pages 2 and 3 of the show cause notice. The fact that the petitioner in the first petition is enlarged on bail is also undisputed. It is in such circumstances that it is alleged that action under sec.56(1)(a)(b) of the Bombay Police Act, 1951 should be initiated against him.

5. Upon the show cause notice being served the father was externed on 31st May, 2006 by directing him to remove himself not only from Mumbai and Mumbai Suburban District but from Thane and Raigad districts as well.

6. The father then challenged this order before the Appellate Authority who is none other than the Principal Secretary, Department of Home, Government of Maharashtra. The Appellate Authority has confirmed the order on 14th August, 2006 and that is how the father has challenged the externment proceedings in this Court.

7. As far as son is concerned, he has also been served with a show cause notice of the same date and he is also externed by order of the same date from the same areas as that of his father.

8. His appeal is also dismissed by the order delivered on the same date by the Appellate Authority.

9. Shri Patil appearing for the petitioner has raised two contentions. His first submission is that the order is excessive in as much as the petitioners are sought to be externed from the area with regard to which neither is any nexus nor is it established that there is connection with these areas. Thus, there is no necessity of externing them from these areas. The second submission is that the order passed by the Authorities is vitiated by total non application of mind in as much as before the externment order was passed in the show cause notice several instances and cases are mentioned and it is alleged that about 7 in camera statements have been recorded which prove that the petitioners' activities are such that people are scared of coming out in open and deposing against them. However, none of these statements nor the cases are referred to in the subject externment order. Thus, the order of externment has been passed without authorities satisfying themselves with regard to prerequisite for doing so.

10. On the other hand, the learned A.P.P. Shri Saste invited my attention to the affidavit in reply and the

order of the Appellate Authority where, according to him, all materials which are forming part of the show cause notice and based upon which the externment order has been passed, have been referred and duly considered. In his submission, therefore, the impugned orders do not require any interference.

11. I have perused the show cause notices and the impugned orders so also the affidavits in reply. In my view, the show cause notices clearly allege that from the year 2002 till date of issuance of the show cause notices there are cognisable offences registered against the petitioners at Dindoshi Police Station and the petitioners have been arrested therein but enlarged on bail.The details of the offences alleged, instances out of which same arise are narrated and thereafter it is said that from 2002 onwards. the offences have been committed and there are several persons who are victims of the acts of the petitioners. Therefore, the affected persons are not in a position to depose either in the Court of law or otherwise. Therefore, there is necessity to extern the petitioners.

12. However, in the order of externing authority what has been done is mere reproduction of the allegations in the show cause notice and in para 3 it has been observed that

during the course of externment proceedings there are some materials which have been placed on record and those have been taken into account and considered by the externing authority. Similarly, the Externing Authority has taken into consideration certain statements made in writing and orally along with other evidence. However, barring these observations there is absolutely no discussion nor are any reasons assigned which would indicate that the concerned Externing Authority is satisfied that the order under the relevant statutory provisions needs to be passed in the facts of this case. Thus, the material collected including the incamera statements are not referred to and relied upon by this Authority. The order refers to some material and evidence. However, it is a matter of guess work whether the said material is the same which is referred to in the show cause notice or not cannot be ascertained from the order of the Externing Authority.

13. I am unable to accept the contention of Shri Saste that entire material has been referred to in the order of the Appellate Authority and there are reasons assigned in the same. Consequently, it is not necessary to quash and set aside the impugned orders. Shri Saste has been unable to demonstrate as to how if at the initial stage when there is non application of mind and the reasons are not assigned and, therefore, the order may be vitiated but

such order need not be set aside because in Appeal these infirmities are taken care of. In my view, principles of natural justice demand that the Externing Authority at the initial stage itself should comply with the same. It is well settled that an unfair trial cannot be cured by a fair appeal.Therefore, I am not in a position to accept these submissions of Shri Saste.

14. That apart, Shri Patil has pointed out to me that even the Appellate Authority has failed to apply its mind and in that behalf relies upon para 12 of the Appellate order. From perusal of the same, it appears that the satisfaction in terms of the relevant statutory provisions has not been properly arrived at. The provisions are referred but not considered. Therefore, the appellate order also suffers from the same infirmity. The so called in camera statements of about 7 persons may find a reference in the appellate order but there is absolutely nothing to indicate that the externing authority had before it these statements or that after taking them on record it complied with the principles of natural justice, by putting the said material to the petitioners, before, relying upon the same. In such circumstances, the infirmities remain and have not been cured at all.

15. There is much substance in the second contention of

Shri Patil in as much as both orders donot indicate as to why the petitioners are required to be externed from Thane and Raigad districts. Admittedly, both petitioners are residing in Mumbai. The alleged offences have been committed by them within the limits of Dindoshi police station and that is how the show cause notices proceed. The show cause notices do not indicate as to how the activities of the petitioners have any bearing to other areas or that they are such that by moderm means of communication the petitioners are able to reach these areas as well. In other words, the prerequisites in that behalf are not satisfied. Therefore, the orders can safely be termed as excessive as well. It is in these circumstances I agree with Shri Patil that the impugned orders cannot be sustained and are required to be quashed and set aside.

16. As a result of the above discussion, Rule in both these petitions will have to be made absolute and accordingly is made absolute in terms of prayer clause (c). The impugned orders of Externment are quashed and set aside.

(S.C.DHARMADHIKARI J.)